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No. 08-737

Supreme Court, U.S.
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In the
Supreme Court of the United States

DHL EXPRESS (USA), INC.,

Petitioner,

v.

GINA ONTIVEROS,

Respondent.

On Petition for Writ of Certiorari to the California Court of Appeal, First Appellate District

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI OR FOR SUMMARY REVERSAL

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QUESTION PRESENTED

The Federal Arbitration Act preempts state restrictions on the enforcement of arbitration agreements, and bars state courts from employing any unique "unconscionability" analysis to arbitration agreements that differs from the unconscionability analysis applied to other contracts. *See, e.g., Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987). The California Court of Appeal applied an unconscionability analysis in this case that is uniquely predicated on the fact that the contract at issue is an arbitration agreement. Does the decision below conflict with the Federal Arbitration Act?

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of the Petitioner.[1]

PLF was founded more than 35 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide. Among other things, PLF's Free Enterprise Project defends the freedom of contract, including the right of parties to agree by contract to the process for the resolution of disputes between them. To that end, PLF has participated as amicus curiae in many important cases involving the Federal Arbitration Act and freedom of contract in general, including *Preston v. Ferrer*, 128 S. Ct. 978 (2008); *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008); *Gentry v. Superior Court*, 42 Cal. 4th 443 (2007), *cert. denied sub nom. Circuit City Stores, Inc. v. Gentry*, 128 S. Ct. 1743 (2008); and *Cingular Wireless, LLC v. Mendoza*, 547 U.S. 1188

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

(2006). PLF believes its public policy experience will assist this Court in its consideration of the petition.

SUMMARY OF REASONS FOR GRANTING THE PETITION

The petition for writ of certiorari should be granted for review on the merits for at least the following three reasons. In the alternative, the Court ought to grant the petition and summarily reverse the decision of the California Court of Appeal.

1. The decision below directly contradicts this Court's pronouncement that states may not devise unique "unconscionability" analyses for purposes of voiding agreements to arbitrate—agreements that are guaranteed by federal statute. *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987).

2. California courts routinely abuse the unconscionability theory to void arbitration contracts, in direct conflict with the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* (FAA), and with this Court's binding precedent. When state courts devise new and unprecedented unconscionability theories in the service of judicial policy preferences, they violate not only the federal statute but the federal Constitution's guarantees of the right to make and enforce contracts.

3. If allowed to stand, the decision below will invite further innovations by obstructionist state courts that use federalism as a shield for their violations of federally protected individual rights. This Court has repeatedly invalidated such attempts—*see, e.g., Bouie v. City of Columbia*, 378 U.S. 347 (1964); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958)—and it should continue to bar state courts from

invoking novel, purportedly state-law theories to avoid review by this Court.

THIS CASE WARRANTS SUMMARY REVERSAL

If this Court chooses not to review the full case on the merits, it should summarily reverse, given that "the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error." *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting). The California Court of Appeal constructed a new and unprecedented theory of unconscionability uniquely applicable to arbitration agreements, thereby directly conflicting with this Court's statement in *Perry*, 482 U.S. at 492 n.9, and in clear contravention to the preclusive effect of the FAA.

ARGUMENT

I

THE DECISION BELOW CREATES A NEW AND UNPRECEDENTED UNCONSCIONABILITY DOCTRINE WHICH ALLOWS STATE COURTS TO INVALIDATE FEDERALLY PROTECTED ARBITRATION AGREEMENTS AT WILL

The FAA guarantees the enforceability of arbitration agreements between private parties. The policy behind that statute is to ensure that the law gives effect to the choices of those people who sign arbitration agreements. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 220 (1985) ("first and foremost" purpose of the FAA is "to enforce agreements into which parties had entered.").

The hallmark of the right to make contracts—whether arbitration contracts or any other kind of contract—is freedom of choice. For that reason, courts have repeatedly warned against the temptation to use such legal theories as "unconscionability" or "public policy" to alter or to void contracts to which people have agreed. Nevertheless, California courts have time and again yielded to this temptation in the context of arbitration contracts, and imposed their judicial policy preferences on people against their will by annulling the contracts they have signed. In doing so, these courts violated both the Act and the Constitution. This Court should act to stop such abuses.

A. The Decision Below Conflicts Directly with This Court's Unambiguous Prohibition Against State Courts Devising New Unconscionability Doctrines with Which to Void Federally Protected Arbitration Agreements

This Court has often declared that the FAA preempts state laws that deny enforcement to arbitration contracts. As a matter of federal law, the arbitrator must determine the validity of an arbitration agreement in the first instance, even if the other clauses in the agreement are arguably invalid. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006) ("[R]egardless of whether the challenge is brought in federal or state court, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator."). Even if state law would otherwise require the validity of an agreement to be determined in the first instance

by a state administrative agency, the FAA requires that validity be determined in the first instance by the arbitrator. *Id.*; *accord*, *Preston v. Ferrer*, 128 S. Ct. 978, 987 (2008).

Of course, states retain their common law authority to invalidate contracts that are defective in formation, and this rule applies to arbitration agreements no less than to other kinds of contracts. *Perry*, 482 U.S. at 492 n.9. But this caveat would swallow up the rule if state courts could simply declare arbitration agreements to be invalid on public policy grounds, or subject to heightened scrutiny. States could then avoid the mandate of the FAA entirely, and because they could plausibly cite "independent state grounds" for doing so, such evasion of the law would be insulated from this Court's review.

It was to block this obvious and unfair tactic that this Court declared that state law grounds for invalidation must not "take[] [their] meaning precisely from the fact that a contract to arbitrate is at issue . . . . A court may not . . . rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable." *Id.* Or, as the Court rephrased the point in *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996), "Courts may not . . . invalidate arbitration agreements under state laws applicable *only* to arbitration provisions." Yet this is *exactly* the tactic adopted by the court below.

The California Court of Appeal began its analysis here by concluding that the arbitration agreement was a contract of adhesion, because it was a standardized contract offered by "the stronger party," and offered on a "take it or leave it" basis. *Ontiveros v. DHL Express*

(USA), Inc., 164 Cal. App. 4th 494, 504 (2008) (citation omitted). These elements have never before sufficed to classify a contract as adhesive and unenforceable either in California or federal law. *See, e.g., Cubic Corp. v. Marty*, 185 Cal. App. 3d 438, 449-50 (1986); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991) ("Mere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context."). As the Seventh Circuit noted in *IFC Credit Corp. v. United Bus. & Indus. Fed. Credit Union*, 512 F.3d 989, 992-93 (7th Cir. 2008), form contracts are "common and enforceable" and serve an economically efficient purpose: "As long as the price is negotiable and the customer may shop elsewhere, consumer protection comes from competition rather than judicial intervention."

Thus, to be unenforceably adhesive, a contract must also include some element of duress or lack of free choice. *See Marty*, 185 Cal. App. 3d at 449 ("[T]he weaker party may have no realistic opportunity *to look elsewhere* for a more favorable contract." (emphasis added)); *accord, Madden v. Kaiser Found. Hosps.*, 17 Cal. 3d 699, 710-11 (1976); *Spinello v. Amblin Entm't*, 29 Cal. App. 4th 1390, 1396-97 (1994); *Dean Witter Reynolds, Inc. v. Superior Court*, 211 Cal. App. 3d 758, 766-67 (1989).

There is no evidence in this case that Ms. Ontiveros was for any reason barred from looking for employment elsewhere if she disliked the terms on which DHL offered her employment. In *Spinello*, the court of appeal found that a form arbitration agreement was not adhesive because the plaintiff "had the opportunity to go elsewhere . . . [by] submitt[ing]

his script to . . . other producers." 29 Cal. App. 4th at 1397. And in *Dean Witter*, the court recognized that the "availability of alternative products in the market . . . . demonstrates that any claim based on unconscionability lacks merit." 211 Cal. App. 3d at 767. Alternatives are available to employees who do not want to sign arbitration agreements; fewer than half of the employment contracts in California require such agreements. Theodore Eisenberg & Geoffrey P. Miller, *The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies*, 56 DePaul L. Rev. 335, 361 (2007).

There was simply no precedent in California law for declaring that Ms. Ontiveros' arbitration contract was unenforceably adhesive just because it was on a standard form and was presented on a take-it-or-leave-it basis. Many, if not most, modern business contracts are printed on standard forms and offered on a "take-it-or-leave-it" basis. *See IFC Credit Corp.*, 512 F.3d at 992-93; *Goodwin v. Ford Motor Credit Co.*, 970 F. Supp. 1007, 1015 (M.D. Ala. 1997) ("[S]tandardization of forms for contracts is a rational and economically efficient response to the rapidity of market transactions and the high costs of negotiations . . . which contributes to rational pricing."). Customers are not invited to bargain over the prices offered at a fast-food restaurant, for example, or whether they are required to use safety devices when riding on the attractions at an amusement park, yet California courts have never held that this renders such contracts unenforceably adhesive. It is only where a party *lacks free choice*—such as the choice to shop elsewhere or get a job elsewhere—that a contract may qualify as adhesive. *Marty*, 185 Cal. App. 3d at 449. The fact

that Ms. Ontiveros could have chosen employment at any of a vast number of other employers shows that she had the type of free choice that renders her unconscionability claim meritless. *Dean Witter*, 211 Cal. App. 3d at 768 ("[T]he existence of a 'meaningful choice' to do business elsewhere must tend to defeat any claim of oppression."). *See also Ryan v. Dan's Food Stores, Inc.*, 972 P.2d 395, 404 (Utah 1998) (employment contract was not adhesive where employee "was free to seek employment with another pharmacy that did not maintain [the challenged employment policy]").

Adhesiveness has never been held sufficient to render a contract unenforceable in California law; there must be some element of substantive unconscionability as well. *See Graham v. Scissor-Tail, Inc.*, 28 Cal. 3d 807, 819-20 (1981). Here, the court of appeal explicitly analyzed the alleged substantive unconscionability of this contract differently than other types of contracts because this case involves an arbitration agreement: "We have a genuine concern about the potential for the inequitable use of such arbitration provisions in areas, such as employment." *Ontiveros*, 164 Cal. App. 4th at 505.

It cited various "advantages" which business defendants allegedly enjoy in arbitration, *id.*, and quoted at length from two law review articles opposed to arbitration on policy grounds. *Id.* at 506 n.6, 506-07. It then recited from the *dissenting* opinion in this Court's *Prima Paint* decision to support the conclusion that arbitration contracts should be subjected to a special kind of unconscionability analysis. *See id.* at 506-07 (quoting *Prima Paint Corp. v. Flood &*

Conklin Mfg. Co., 388 U.S. 395, 403-06 (1967) (Black, J., dissenting)).

Yet *Perry* and *Doctor's Associates*—which the court below did not mention—could not be clearer: courts "may not . . . . rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable." *Perry*, 482 U.S. at 492 n.9.

Indeed, in *Southland Corp. v. Keating*, 465 U.S. 1, 16 n.11 (1984), this Court responded to Justice Black's *Prima Paint* dissent by reiterating that a state may not apply a unique unconscionability analysis (or any other substantive limit) to arbitration contracts that are not applied to all other contracts. Otherwise, the Court held, "states could wholly eviscerate Congressional intent to place arbitration agreements 'upon the same footing as other contracts . . . .' We have rejected this analysis because it is in conflict with the Arbitration Act and would permit states to override the declared policy requiring enforcement of arbitration agreements." *See also Buckeye Check Cashing*, 546 U.S. at 446 (reiterating *Southland*'s response to Justice Black's *Prima Paint* dissent).

The bottom line is that states may not "place[] arbitration agreements in a class apart from 'any contract' " for purposes of testing their validity. *Doctor's Associates*, 517 U.S. at 688. Yet here, the California Court of Appeal crafted a novel unconscionability analysis, specially applicable to arbitration agreements, so that it could void those agreements and evade review by this Court. This should not be allowed to stand.

B. The Decision Below Is Part of California's Routine Abuse of Unconscionability Doctrine to Deprive Individuals of Their Constitutional Right to Make and Enforce Contracts

California courts have declared their open hostility to the process of arbitration. *See generally* Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts Are Circumventing the Federal Arbitration Act*, 3 Hastings Bus. L. J. 39 (2006). Although the state's courts continue to recite *pro forma* statements to the effect that public policy favors the use of arbitration, *see, e.g.*, *Bouton v. USAA Cas. Ins. Co.*, 167 Cal. App. 4th 412, 419-20 (2008), the reality is that they routinely seek opportunities to nullify validly formed contracts which include arbitration provisions. They often use the unconscionability doctrine to do so, principally because "[u]nconscionability is one of the most amorphous terms in the law of contracts." Michael G. McGuinness & Adam J. Karr, *California's "Unique" Approach to Arbitration: Why This Road Less Traveled Will Make All the Difference on the Issue of Preemption Under the Federal Arbitration Act*, 2005 J. Disp. Resol. 61, 74 n.111 (2005) (citation omitted).

Broome, *supra*, has detailed the ways in which "California courts continue to view arbitration agreements as a 'lesser caste' of contract provision to be ignored whenever the court suspects one party may be disadvantaged." *Id.* at 67. He performed a thorough empirical analysis showing that California courts disproportionately favor unconscionability arguments in cases involving arbitration agreements

as opposed to other types of contracts, *id.* at 44-48, and he observed that California courts apply a different type of unconscionability analysis to arbitration agreements than to other types of agreements. *Id.* at 60 ("In the non-arbitration setting, courts . . . in California, seek to discover . . . the circumstances surrounding the signing of the contract . . . . For arbitration agreements, by contrast, adhesion alone is enough to satisfy the California courts that the agreement is procedurally unconscionable."). Of the 114 cases in which California courts of appeal considered the alleged unconscionability of arbitration contracts in the years between 1982 and 2006, 53 resulted in a finding of unconscionability and 13 more found some other reason to void the arbitration provision. *Id.* at 44-45. But in 46 unconscionability cases that did not involve arbitration contracts, 41 decisions rejected the unconscionability argument, and only 5 annulled the contracts.

California courts are biased in this way because they are highly suspicious of arbitration, and assume that it is biased in favor of businesses and against employees. They strongly favor litigation in state courts instead, and routinely impose that preference on contracting parties by invalidating their agreements under special tests that apply only to arbitration agreements. In *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83 (2000), for example, the California Supreme Court adopted the so-called "mutuality test," under which a contract may be deemed unconscionable when it is unfairly one-sided and does not include a meaningful bilateral exchange. *Id.* at 116. But while it purports to be a general rule applicable to all kinds of contracts, the "mutuality test" is actually a special test applied specially to arbitration

agreements—and therefore invalid under *Doctor's Associates* and *Perry*, which bar the use of unique legal tests to test the validity of arbitration contracts.

Indeed, the *Armendariz* decision itself relied specifically on the alleged unfairness inherent in arbitration contracts, and not on general principles of contract law:

> *[I]n the context of an arbitration agreement* imposed by the employer on the employee, such a one-sided term is unconscionable . . . . [T]he doctrine of unconscionability limits the extent to which a stronger party may, through a contract of adhesion, impose the arbitration forum on the weaker party without accepting that forum for itself.

Id. at 118 (emphasis added). Most notably, California courts do not apply the "mutuality" approach outside the arbitration context. *See, e.g., Principal Mut. Life Ins. Co. v. Vars, Pave, McCord & Freedman*, 65 Cal. App. 4th 1469, 1489 (1998) (unilateral agreement upheld because "where sufficient consideration is present, mutuality is not essential."); *Hillsman v. Sutter Cmty. Hosps. of Sacramento*, 153 Cal. App. 3d 743, 752 (1984) (same). The "mutuality" test is therefore not a general test of contract law but a special, substantive rule which limits the availability of arbitration and the conditions under which the parties may choose arbitration.[2]

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[2] Moreover, the *Armendariz* court misapplied the "mutuality" test. "[T]he law does not require that the parties have similar remedies in case of breach, and the fact that specific performance or an injunction is not available to one party is not a sufficient reason for refusing it to the other party." *Restatement (Second) of*

(continued...)

Other courts have also criticized the "mutuality" test of *Armendariz* because of its clear conflict with this Court's prohibition of unique unconscionability analyses in arbitration cases. In *Ex Parte McNaughton*, 728 So. 2d 592 (Ala. 1998), the Alabama Supreme Court noted that *Armendariz* "assigns a suspect status to arbitration agreements," and thus "flies in the face of *Doctor's Associates*." *Id.* at 598. In *Gray v. Conseco, Inc.*, No. SA CV 00-322DOC (EEX), 2000 WL 1480273 (C.D. Cal. Sept. 29, 2000), the court observed that the *Armendariz* "rule singles out and imposes a special burden on arbitration agreements," contrary to the requirements of the FAA. *Id.* at *4.

In short, while the *Armendariz* "mutuality" rule purports to be a general rule of contract law that invalidates some kinds of arbitration agreements, it is a unique substantive limit, applicable only to arbitration contracts, which requires that parties to an arbitration agreement—but not parties to other types of contracts—undertake specific duties, and renders agreements unenforceable if they lack such obligations. *That rule is a device which singles out arbitration contracts and treats them differently than other types of contracts.*

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[2] (...continued)
Contracts § 363 cmt. c (1981). Mutuality does not require that each side agree to undertake an identical obligation. If parties agree that, in exchange for consideration, one side will in the future submit to arbitration while the other will not, that contract is still mutually binding and survives the mutuality requirement. *See Raasch v. NCR Corp.*, 254 F. Supp. 2d 847, 857 (S.D. Ohio 2003); *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 757 (Tex. 2001); *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 180 (3d Cir. 1999); *In re Pate*, 198 B.R. 841, 844 (Bankr. S.D. Ga. 1996).

Much more extreme was *Gentry v. Superior Court*, 42 Cal. 4th 443 (2007), *cert. denied sub nom. Circuit City Stores, Inc. v. Gentry*, 128 S. Ct. 1743 (2008). There, the California Supreme Court declared an arbitration agreement unconscionable because it waived an employee's right to bring a class action lawsuit. It did so despite the fact that the employees were given an information packet on the effect of the arbitration agreement, were required to watch a video providing information on the arbitration process, were told to consult an attorney before signing if they were unclear on its legal effect, and were not only *given the choice not to sign*, but were given a grace period in which to *change their minds after signing*. *See id.* at 474 (Baxter, J., dissenting). In addition, the court ignored the fact that California workers who disapprove of arbitration requirements have many other options for seeking employment. Eisenberg & Miller, *supra*, at 361.

The *Gentry* court admitted that the employer did not compel workers to sign, but concluded that the agreement was "not entirely free from procedural unconscionability" because employees "felt at least some pressure" to sign it. *Id.* at 472. As the dissenting justice observed, the court's justifications for resisting the use of arbitration in lieu of class action litigation may have made good policy arguments, but the Legislature had chosen to enact a procedure allowing for arbitration, and declaring that public policy *favored* arbitration. The *Gentry* court simply "elevat[ed] a mere judicial affinity for class actions as a beneficial device for implementing the wage laws above the policy expressed by both Congress and our own Legislature." *Id.* at 477 (Baxter, J., dissenting).

Decisions like these do not merely increase the already high cost of doing business in California; more fundamentally, they violate the vital constitutional right to make and enforce contracts. Article I, section 10, of the Constitution forbids states from impairing the obligation of contracts, and while that prohibition has long been understood as allowing states broad leeway to set the terms on which contracts may be based, it does not allow and never has allowed limitless authority to states to override the contractual choices citizens make. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 n.15 (1978) ("'[P]rivate contracts are not subject to unlimited modification under the police power.'" (quoting *United States Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 22 (1977))).

In a case like this, where Congress has affirmatively chosen by statute to guarantee the validity of the contracts at issue, it is especially unlikely that the state can articulate the type of justification necessary to overcome the constitutional protection of contractual choices.

II

STATE COURTS SHOULD NOT BE FREE TO DEVISE SPECIAL STATE-LAW THEORIES TO VOID CONTRACTS OF WHICH THEY DISAPPROVE AND THEREBY EVADE THIS COURT'S REVIEW

This Court has long recognized the danger that "if nonfederal grounds, plainly untenable, may be . . . put forward successfully, our power to review easily [might] be avoided." *Ward v. Bd. of County Comm'rs of Love County, Okla.*, 253 U.S. 17, 22 (1920). Therefore,

the Court may inquire into whether the mandates of federal law have been violated "in substance and effect, as by putting forward nonfederal grounds of decision that were without any fair or substantial support." *Id.* at 22 (citing cases).

On that basis, the Court has frequently stepped in to stop states from deploying newly minted "state law grounds" to evade Supreme Court review when depriving individuals of their rights. The most notable example is *Bouie*, 378 U.S. 347, in which the South Carolina Supreme Court reinterpreted its criminal trespass statute to classify a civil rights sit-in as a crime, when it would not previously have satisfied the statutory elements. Although a state's highest court is normally the last word on the interpretation of state law, this Court granted certiorari and reversed, finding that the decision violated the Due Process Clause. *Id.* at 350.

Likewise, in *Alabama ex rel. Patterson*, 357 U.S. 449, this Court reviewed a state conviction for contempt of court, despite the state's argument that the conviction was a state law matter outside this Court's jurisdiction. "Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights." *Id.* at 457-58.

This Court has followed the same rule in many other cases. *See, e.g., Osborne v. Ohio*, 495 U.S. 103, 124-25 (1990); *James v. Kentucky*, 466 U.S. 341, 348-49 (1984); *Douglas v. Alabama*, 380 U.S. 415, 421-22 (1965); *Davis v. Wechsler*, 263 U.S. 22, 24-25 (1923). This Court has the power to ensure that state

judiciaries do not abuse their authority to evade the requirements of federal statutes or the Constitution.

Nevertheless, state courts often employ this "rewriting state law" gambit to deprive property owners of their constitutional rights. In *Hughes v. Washington*, 389 U.S. 290 (1967), Justice Stewart observed that states should not be free to "defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all." *Id.* at 296-97. Yet in *Stevens v. City of Cannon Beach*, 854 P.2d 449 (Or. 1993), where owners of beach property sought just compensation for the state's action in denying them a permit to build a seawall, thereby rendering their property valueless, *see id.* at 450-51, the Oregon Supreme Court denied them compensation on the grounds that "the common law doctrine of custom" barred landowners from excluding the public from dry sand areas. *Id.* at 454. This application of the doctrine of custom had been eliminated as a matter of law four years earlier in *McDonald v. Halvorson*, 780 P.2d 714 (Or. 1989), but the *Stevens* court simply ignored the *Halvorson* decision. This Court denied certiorari, over a dissent by Justices Scalia and O'Connor, who observed that the state court had simply manipulated state law to avoid review by this Court: "As a general matter, the Constitution leaves the law of real property to the States. But just as a State may not deny rights protected under the Federal Constitution through pretextual procedural rulings, neither may it do so by invoking nonexistent rules of state substantive law." *Stevens v. City of Cannon Beach*, 114 S. Ct. 1332, 1334 (1994) (citation omitted) (Scalia and O'Connor, JJ., dissenting from denial of cert.).

The Hawaii Supreme Court employed a similar trick in *McBryde Sugar Co., Ltd. v. Robinson*, 504 P.2d 1330 (Haw. 1973), when, "[t]o the surprise of all concerned," the state court declared that the property at issue—water located on the plaintiffs' land—belonged to the state and could not be sold, meaning that the owners had no property interest in the first place and were therefore not entitled to just compensation. John Martinez, *Taking Time Seriously: The Federal Constitutional Right to Be Free from "Startling" State Court Overrulings*, 11 Harv. J. L. & Pub. Pol'y 297, 342 (1988). By retroactively redefining the property rights in ways that eliminated the right at stake in the case, the state court effected a taking of property in a manner that avoided the requirements of the Fifth Amendment. A federal district court later concluded that the state court's extreme alteration of background principles of state law was an attempt to "take away the private property of the plaintiffs without paying them for it." *Robinson v. Ariyoshi*, 441 F. Supp. 559, 586 (D. Haw. 1977), *aff'd*, 753 F.2d 1468 (9th Cir. 1985), *rev'd*, 477 U.S. 902 (1986) (summary disposition).

Finally, in *Philip Morris USA Inc. v. Williams*, No. 07-1216 (U.S. filed Mar. 24, 2008), currently under consideration by this Court, the Oregon Supreme Court adopted a new rationale to uphold a radically disproportionate punitive damages award after this Court's remand. Despite this Court's clear instruction that the Oregon Supreme Court apply the due process standards enunciated in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), the state court reaffirmed its prior decision instead, citing a

newly discovered state law procedural barrier—one which parties had neither briefed nor argued in the near decade in which that case has been litigated. *Williams v. Philip Morris Inc.*, 176 P.3d 1255, 1260 (Or. 2008). There is little question that the state court adopted this procedural device to reaffirm the punitive damages verdict in spite of this Court's direct instruction.

If California courts can employ a special unconscionability analysis to arbitration contracts, and then use the fact that unconscionability is a matter of state common law as a shield against this Court's review, they will effectively escape the requirements of the FAA and the Supremacy Clause. The California judiciary's attempt to thwart the use of arbitration will succeed unless this Court enforces its pronouncements in *Perry* and *Doctor's Associates* that unconscionability analysis may not single out arbitration contracts and treat them differently than other kinds of contracts.

III

THIS CASE IS APPROPRIATE FOR SUMMARY REVERSAL BECAUSE THE DECISION BELOW IS FLATLY CONTRARY TO THIS COURT'S SETTLED PRECEDENT

Although this Court is not normally occupied with correcting mere errors of law, summary reversal is appropriate in those unusual cases in which a clearly erroneous decision threatens to cause significant disruption of settled law in the future. *See, e.g.*, *Arkansas v. Sullivan*, 532 U.S. 769, 771 (2001) ("Because the Arkansas Supreme Court's decision on rehearing is flatly contrary to this Court's controlling

precedent, we grant the State's petition for a writ of certiorari and reverse.").

The court of appeal's decision in this case is more than an erroneous application of controlling precedent; it is part of a notorious and continuing effort by the California judiciary to undermine the federally mandated enforcement of arbitration agreements.

Because the California Supreme Court denied review, the decision of the court of appeal will be the final word in the state unless this Court acts. Trial courts throughout California's First Appellate District—which includes San Francisco and surrounding counties—will be bound by its determination to treat arbitration contracts differently from other types of contracts for purposes of testing unconscionability, in direct conflict with this Court's statements in *Perry*, *Doctor's Associates*, and other cases. The decision threatens the validity of all arbitration clauses in standardized form contracts because it holds (in conflict with *Preston* and *Buckeye Check Cashing*) that a "provision requiring that the arbitrator decide enforceability issues is substantively unconscionable." *Ontiveros*, 164 Cal. App. 4th at 510. If this Court simply denies certiorari, it will invite further abuses.

Indeed, in just the time since the decision below was announced, California courts of appeal have already begun relying upon it to justify treating arbitration agreements differently than other types of contracts for purposes of unconscionability analysis. In *Brown v. Wells Fargo Bank, NA*, No. B196258, 2008 WL 4986125 (Cal. Ct. App. Nov. 25, 2008), the court of appeal declared that California courts "have specifically held that unconscionability constitutes a

defense against agreements to arbitrate." *Id.* at *8. *See also La Sala v. Bally Total Fitness Corp.*, No. A118461, 2008 WL 3274426, at *11 n.4 (Cal. Ct. App. Aug. 11, 2008) (relying on *Ontiveros* to decide, contrary to *Buckeye Check Cashing* and *Preston*, that "unconscionability is for the trial court to decide").

Summary reversal is unquestionably an extraordinary remedy, but it is appropriate where "the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error." *Schweiker*, 450 U.S. at 791 (Marshall, J., dissenting). The decision below treats arbitration contracts differently from other types of contract, in direct conflict with the settled law, due to the state court's "concern about the potential for the inequitable use of such arbitration provisions." *Ontiveros*, 164 Cal. App. 4th at 505. Whether or not those concerns are warranted, the FAA, as interpreted by repeated and unambiguous holdings of this Court, forbids states from treating arbitration provisions differently from other types of contracts for purposes of unconscionability analysis. Yet that is exactly what the decision below did.

If the decision below is allowed to stand, trial courts will deny enforcement to arbitration agreements despite the requirements of federal law, and California will continue to thwart the repeated holdings of this Court that require the enforcement of agreements to arbitrate. The error below should not be allowed to stand. This case is an appropriate candidate for summary reversal.

CONCLUSION

The petition for certiorari should be *granted*, and if the Court declines to hear the full case on the merits, it ought to *summarily reverse*.

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Respectfully submitted,

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